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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MARINE SHALE PROCESSORS, INC.,
Petitioner
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

PREFACE

In June, 1990, the Environmental Protection Agency ("EPA") brought suit against petitioner Marine Shale Processors, Inc. ("MSP"), alleging that MSP was operating a hazardous waste incinerator without an incinerator permit. MSP answered by saying that it was an aggregate kiln and therefore required no incinerator permit. A year later, while the federal lawsuit was progressing, the EPA promulgated new regulations requiring aggregate kilns and other boiler and industrial furnaces ("BIF's") to obtain BIF permits. MSP then applied for such a permit. EPA pretermitted ruling on MSP's application for a BIF permit as an aggregate kiln, pending the federal court's resolution of MSP's disputed status as an aggregate kiln. A federal jury declared MSP to be an aggregate kiln. Disgruntled, EPA revived the BIF permit proceedings, and,

based on the same evidence as presented to the federal jury, expressly rejected the findings of the federal court and jury and held that MSP was not an aggregate kiln. The decisionmakers in the EPA permit proceedings were also intimately involved in the enforcement effort before the federal court.[1]

In this case, the EPA has confused the concepts of parallel agency proceedings with an agency's overruling of a federal court and jury. More particularly, a single overriding common issue was before both the federal jury and, later, the EPA: whether MSP is an aggregate kiln. Any attempt to distinguish between a federal jury determining "past" activity and the EPA's determining "future" permit entitlement is illogical because the determination of the single issue of MSP's status as an aggregate kiln would resolve both past and present operations. If MSP is an aggregate kiln, it suffers no penalty for past operations and is entitled to a permit for future operations. The federal jury ruled, and an Article III judge confirmed, that MSP is indeed an aggregate kiln. The Executive Branch cannot overrule that finding.

This case involving violations of the Seventh Amendment and Article III of the United States Constitution presents profoundly important issues of federal agency procedure and decisionmaking. These issues with broad and far-reaching impact on all federal permitting agencies warrant a full examination by this Court, not just to correct the errors in this specific case, but to inform the regulators and the regulated about the proper balance between the Executive and Judicial Branches.

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[1] Detailed references in support of this regulatory background, prior district court proceedings, and administrative proceedings appear in pages 4-10, MSP's Petition for Writ of Certiorari.

I. BECAUSE ON ITS FACE THE ENVIRONMENTAL PROTECTION AGENCY'S DECISION EXPRESSLY REJECTS ACTUAL FINDINGS AND LEGAL CONCLUSIONS OF A FEDERAL DISTRICT COURT, THE AGENCY'S VIOLATION OF THE SEVENTH AMENDMENT AND ARTICLE III IS CLEARLY PRESENTED FOR THIS COURT'S REVIEW

The Seventh Amendment to the United States Constitution directly prohibits the EPA action that the decision below affirmed:

> . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

EPA cites *Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 53-54 (1989) for its proposition that since Congress may assign adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury fact finder. Brief in Opposition, p.9. EPA also asserts it has never disputed MSP's right to a jury trial in the district court enforcement proceeding. *Id.* Those assertions do not address the real issues in this case. MSP does not dispute that the EPA could have instituted some regulatory proceedings to enforce its permit requirements. However, EPA chose instead to invoke the jurisdiction of the federal court and jury. The laws and regulations under which the EPA operates are "either/or;" that is, EPA at its option could have proceeded administratively, or it could have brought an enforcement action invoking the full power and authority of an Article III court and jury. EPA decided to bring a federal district court enforcement action, and when MSP later filed (as required by new law) a permit application to be recognized as an aggregate kiln, EPA deferred action on that application in proper deference to the constitutional authority of the federal courts. The issue in the EPA permit pro-

ceeding was not whether MSP "operated an aggregate kiln that qualified as an individual furnace" (Br. in Opp., p. 4) but whether MSP operated an aggregate kiln which would automatically qualify MSP's kiln as an industrial furnace. 40 C.F.R. § 266.10.

Once the Seventh Amendment is activated on a factual issue, a party is entitled to have the question resolved by a jury. *Lytle v. Household Mfg., Inc.*, 491 U.S. 545, 550-53 (1990). *Granfinanciera, S.A. v. Nordberg, supra,* supports MSP. In *Granfinanciera,* this Court stated that "Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabelling the cause of action to which it attaches and placing exclusive jurisdiction in an administrative agency. . . ." 492 U.S. at 61. EPA's attempt to distinguish its adjudicative function as a "permit proceeding" is precisely the type of relabelling that this Court condemned in *Granfinanciera.* If Congress lacks constitutional authority to strip a party of those rights, *a fortiori* an administrative agency lacks such authority. The same constitutional protection precludes an agency from usurping the role of the jury on other aspects of the case that remain pending in the district court. *Cf. Beacon Theaters, Inc. v. Westover,* 359 U.S. 500, 508 (1959).

EPA's position that its action has not interfered with the district court enforcement action "in any way" defies the facts and reality. The Brief in Opposition states at page 8:

> Hence, the situation bears no similarity to the case that would be posed if Congress or an Executive Branch Agency attempted to revise an Article III court's decision.

But, that is *exactly* what the EPA did in this case. The *only* way EPA could rule against petitioner in EPA's subsequent permit proceedings was to reverse and revise the Article III court and jury's ruling that MSP was an ag-

gregate kiln.[2] While the *effects* of the federal court proceeding and the administrative proceedings may have differed, the issue in both proceedings was identical.

In stating at page 8 of its opposition that ". . . the decision whether to issue a prospective permit had no effect on the pending enforcement action, which is concerned solely with past violations," EPA misses the point. The district court and jury ruled MSP to be an aggregate kiln, a conclusion of past and current status that should guarantee future operations. Yet EPA subsequently disregarded that jury finding and attempted to deny MSP its right to future operations. Any future relief in the so-called "pending enforcement action" would be meaningless since the EPA has chosen to deny MSP its existence by "re-examining" facts tried by the Seventh Amendment jury.

Petitioner does not urge this Court to rule that the government's initiation of an enforcement action irretrievably commits all related matters to the Judicial Branch or that the Executive Branch and the courts cannot simultaneously consider related issues within their respective spheres. Br. in Opp., p. 7. Petitioner does urge, however, that the Executive Branch cannot act in violation of and inconsistent with a prior judicial ruling at its own request on the same issue between the same parties.

This Court has granted certiorari in the past to examine the delicate balance of power between the branches of government and the process whereby federal agencies reach their administrative decisions. See Pet., p. 13. It should do so again in this case to provide guidance to federal agencies and courts on this recurring issue.

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[2] There is no doubt the EPA reversed the district court findings. Notwithstanding the jury's findings and the district court's orders adopting them, only three months later the EPA determined MSP was *not* an aggregate kiln. E-27 (Pet. App., 60a-129a). EPA arrogantly rejected the district court's ruling that a kiln system qualifies as an industrial furnace and declared that the district judge "misunderstood" the evidence. EAB-37 at 2 (Pet. App., 6a, 116a).

II. THE ENVIRONMENTAL PROTECTION AGENCY'S COMMINGLING OF AGENCY PERSONNEL BETWEEN THE ENFORCEMENT PROCEEDING AND PERMITTING PROCEEDING VIOLATES DUE PROCESS, AND THE FIFTH CIRCUIT'S AFFIRMANCE OF EPA'S ACTION IS IN DIRECT CONFLICT WITH THE SEVENTH CIRCUIT

EPA's opposition to the writ application underscores the due process violations in this case and the reasons why this Court should grant certiorari to review EPA's gross departure from proper proceedings by utilizing the same agency personnel who actively participated in the enforcement proceedings in federal court as decisionmakers in the administrative permit proceeding. EPA attempts to minimize the role of its enforcement personnel in its permit proceedings in an unsuccessful effort to distinguish the Fifth Circuit's decision below from the Seventh Circuit's decision in *Bethlehem Steel Corp. v. U.S. EPA*, 630 F.2d 994 (7th Cir. 1980). The facts readily show the irreconcilable conflict between the Circuits on this important issue of administrative due process that this Court should resolve.

Long before he denied MSP a BIF permit in 1994, EPA's ultimate decisionmaker, Dr. Allen Davis, had continually reiterated his adverse views to MSP for five years, beginning in his 1991 initial public letter responding to MSP's application (E.A.B.-66). In his July 1993 deposition in the enforcement litigation, he repeatedly admitted that he had conclusively decided that MSP was not an industrial furnace in 1986, eight years before his reported "review" of the administrative record and his formal decision that MSP was an incinerator (E.A.B.-3, Supp. Ex. 1 at 54, and 36-37). In view of Dr. Davis' role as a witness who testified by deposition that MSP was not an aggregate kiln and who was listed by the government as a trial witness in the enforcement proceeding, this is not a situation where he merely came to a preliminary decision based on some evidence and later confirmed his prior opinion after carefully reviewing all of the evidence. He finally denied

MSP's permit application literally within days of the August 1994 judgment of the district court, and a predrafted decision rested for mere hours on his desk (R.E., Vol. 9, p. 990). The sheer volume of the administrative record (which included the entire trial record) precluded Dr. Davis from anything more than rubber stamping the sixty page administrative decision that Terry Sykes, an EPA attorney active in the enforcement proceeding, had prepared.

Importantly, Terry Sykes played a large role, not a "small role," in both the permit decisionmaking process and in the enforcement proceedings. Ms. Sykes participated in the 1991 preliminary injunction hearing in the district court, attended numerous depositions thereafter, and actively litigated on EPA's behalf throughout the entire trial proceedings. *See* original Petition, pp. 17-18. EPA initially recognized that Ms. Sykes' enforcement effort necessarily disqualified her from participating in the permitting process; and she informed the district court that she was "walled off" from the permitting process because of her participation in the trial. (Tr. 9/8/93 at 38.) After building the wall, EPA quickly destroyed it by assigning to Ms. Sykes the responsibility to draft the final lengthy decision that Dr. Davis rubber stamped in a matter of hours. This is precisely the conduct that the Seventh Circuit justly condemned in *Bethlehem Steel,* where attorneys "who were in charge of the on-going enforcement proceedings against Bethlehem" were also the "attorneys principally in charge of reviewing and recommending a disposition of a [delayed compliance order]" within the agency's administrative process. 638 F.2d at 1008. In addition, the administrative decision was "substantially identical to the language used in a memorandum written by the lead EPA enforcement attorney." *Id.* at 1010.

Furthermore, despite MSP's *prima facie* showing of bias and prejudice that entitled it at the very least to discovery on that issue, the Fifth Circuit refused to remand the case for a further inquiry into the EPA's decision-making

process. As set forth in the Petition (pp. 18-19, n.1), numerous decisions from several Circuits mandate discovery into the potential bias of the decision-makers to insure due process and a fair ruling in a proper proceeding. This Court should address this important and recurring issue that is at the heart of the administrative process.

The decision below is inconsistent with *Bethlehem Steel* and violates MSP's right to due process and fair dealing. Dr. Davis and Ms. Syke's improper cross-pollenization of the enforcement and permitting proceedings cannot be cleansed by a presumption of good faith. This Court should grant certiorari to resolve this conflict between the circuits that impact the constitutional rights of applicants for administrative permits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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